92-1773

Supreme Court, U.S.
FILED
MAY 5 - 1993
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THELMA H. WALKER,

Petitioner,

vs.

STEPHEN R. WINDOM
AND THE LAW FIRM DBA
SIROTE & PERMUTT, ET AL,

Respondents

ON DECISION FROM
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD:

Thelma H. Walker, Pro Se
P. O. Box 689
Fairhope, Alabama 36533-0689
205/928-2655

Respondent's Attorney
Fred K. Granade
Stone, Granade, Crosby & Blackburn, P.C.
34 Pine Street
Bay Minette, Alabama 36507
205/937-2417

QUESTIONS PRESENTED

1. Did the Supreme Court of Alabama deprive the Petitioner due process of law as guaranteed under Amendment XIV when it upheld the Circuit Court's granting of a summary judgment on her amended claim alleging that the Respondents obtained a consumer credit report on her under false pretenses, when there had been no motion for summary judgment on that cause of action by any party to the suit, no hearing on the matter and no sua sponte motion for summary judgment by the Court or notification to any party that the Court was considering a summary judgment on the matter?

2. Did the Supreme Court of Alabama abandon and ignore over 100 years of Alabama case law when it upheld summary judgment for a malicious prosecution claim in favor of the Defendants and did it come in direct conflict with the decisions of the court of last resort in the state of Kansas when its decision means that an attorney has no obligation to investigate the law and the facts before bringing suit against another party

and does this decision provide unequal protection under the law in favor of attorneys that initiate litigation maliciously?

3. Did the courts of Alabama illegally invade the province of the jury by issuing summary judgment, thereby depriving the Petitioner of the right of trial by jury, when they decided as a matter of law that the inference of malice could not be made by a jury even though there was before the court unrefuted evidence of a lack of reasonable investigation for the determination of probable cause before bringing suit?

TABLE OF CONTENTS

ON DECISION FROM THE SUPREME COURT OF ALABAMA

OPINIONS BELOW. 7

JURISDICTION. 7

CONSTITUTIONS AND STATUTORY PROVISIONS INVOLVED. 8

STATEMENT OF THE CASE. 8

REASONS FOR GRANTING THE WRIT. 14

CONCLUSION. 27

PROOF OF SERVICE. 28

TABLE OF AUTHORITIES CITED

Page

CASES

Empiregas, Inc. of Elberta v. Feely,
524 So.2d 626 (1988). 26

Hales v. First Nat'l. Bank,
380 So.2d 797 (Ala. 1980). 15, 16

Haverty v. Haverty
35 Kan. 438, 444-45 (1886). 23

Hightower & Co. v. United States Fid. & Guar. Co.
527 So.2d 698 (Ala. 1988). 17

Hunt v. Dresie
740 P.2d 1046 (Kan. 1987) 21, 25

Jordan v. Alabama G.S.R. Co.
81 Ala. 220 (Supreme Court of Alabama,
December Term, 1886). 18

Jordan v. Jordan
653 S.W.2d 356, 358 (Tex.App.-San Antonio 1983). . . 16

Kramer Trading Corp. of Texas v. Lyons
740 S.W.2d 522 (Tex.App.-Houston [1st Dist.] 1987). . 16

MacDonald v. Vasselin
373 S.E.2d 221 (Ga.App. 1988). 16

McLeod v. McLeod
75 Ala. 483. 17

Nelson v. Miller
227 Kan. at 276, 279 and 284. 21

Perry v. Atkinson
240 Cal.Rptr. 402. 16

Saunders v. Ameritrust of Cincinnati
587 F.Supp. 896 (1984). 27

Standard Guaranty Ins. Co. v. Fidelity & Deposit Co. of Maryland,
U.S. Eleventh Circuit Court of Appeals, No. 92-2034, DC No. 91-835 CIV-T-17B. 19

STATUTES

United States Code

Title 15, Section 1666(a)(3)(B). 23, 24, 26

Title 15, Section 1681n. 8

Title 15, Section 1681q. 8, 12, 14

United States Constitution

Seventh Amendment. 8, 17

Fourteenth Amendment. 8, 14

OTHERS

Alabama Rules of Civil Procedures

Rule 56(c). 14

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

THELMA H. WALKER, Petitioner

vs.

STEPHEN R. WINDOM AND THE LAW FIRM
OF SIROTE & PERMUTT, ET AL, Respondents

ON DECISION FROM
THE SUPREME COURT OF ALABAMA

Petitioner, Thelma H. Walker, respectfully prays that a writ of certiorari issue to review the opinion of The Supreme Court of Alabama refusing to reverse and remand for jury trial a summary judgment issued by the Baldwin County Circuit Court on complaints of malicious prosecution and obtaining a consumer credit report under false pretenses.

OPINIONS BELOW

The opinion of The Supreme Court of Alabama is contained in the attached Appendix, beginning at page 1. The denial of the application for rehearing for which no written opinion was issued is contained in the Appendix, beginning at page 8. The decision of the Circuit Court of Baldwin County is contained in the Appendix, beginning at page 9.

JURISDICTION

The opinion of The Supreme Court of Alabama was filed on December 11, 1992. A timely Application for Rehearing was filed on December 28, 1992. The Supreme Court of Alabama's denial of the Application for Rehearing was issued on February 5,1993.

This Petitioner has exhausted her judicial remedies in the highest court of Alabama and believes that the jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments VII and XIV to the United States Constitution are set forth in the attached Appendix on page 10; 15 U.S.C. 1681n, page 10; and 15 U.S.C. 1681q, page 10.

STATEMENT OF THE CASE

CONSTITUTIONAL ISSUES RAISED:

IN THE COURT OF FIRST INSTANCE: In the Circuit Court of Baldwin County, Walker raised the constitutional questions of a right to a trial by jury and equal treatment under the law following summary judgment rendered on January 2, 1992 in her Motion to Vacate Judgment entered January 31, 1992. The judge did not respond to the motion therefore ignoring the constitutional questions.

Walker again raised the constitutional questions of due process of law and right to a trial by jury in her Motion to Recuse filed on January 29, 1992. The Motion to Recuse was denied with no comment on the

constitutional issues.

Walker raised the constitutional issues of due process of law, equal treatment under the law and the right to a jury trial for the third time in her Motion to Reconsider Decision to Recuse filed February 18, 1992. The judge made no response of any type to the motion.

The issue of due process of law was brought up once again by Walker in her Motion for Expedited Hearing on her Motion to Vacate Judgment and Motion to Reconsider Decision to Recuse. The motion was filed with the Circuit Clerk on April 20, 1992. The judge made no response of any type to the motion.

IN THE SUPREME COURT OF ALABAMA: On February 20, 1992, Walker petitioned the Supreme Court of Alabama for a Writ of Mandamus, raising the issues of the right to a jury trial and equal treatment under the law. Attached to the Petition for Writ of Mandamus was a copy of her Motion to Recuse.

On July 30, 1992, in the Brief and Argument of the Appellant, Walker raised the questions of right to a trial by jury, equal treatment under the law and due process of law. The Supreme Court of Alabama issued its opinion on December 11, 1992 ignoring the constitu-

tional issues completely.

In the Appellant's Application for Rehearing, Walker argues again that she was illegally deprived of her constitutional right to a trial by jury, that she was not equally treated under the law or in accordance with the rules of the court and that she was deprived of a hearing on her complaint and denied due process of law. The Supreme Court of Alabama overruled Walker's application for rehearing. No opinion was issued.

GENERAL STATEMENT OF FACTS

On March 4, 1991 this Petitioner was served with both original and alias complaints served by First Alabama Bank as prepared, signed and filed by non-attorney employees of the law firm of Sirote & Permutt, P.C. Walker denied liability and filed a counterclaim against the bank and attempted to enjoin the attorney of record, Stephen R. Windom, and the law firm as additional parties to the suit. The circuit judge declined to enjoin the counsel of record or the law firm as additional parties to the suit. Walker represented herself and prevailed against the bank on their claim

and prevailed against the bank on her counterclaim.

Walker initiated a separate lawsuit against the law firm and Stephen R. Windom, the counsel of record and a state senator. After obtaining an interlocutory dismissal of the bank's claim on July 31, 1991 and before obtaining a final judgment against the bank, Walker amended her claim to include a separate cause of action for malicious prosecution, based on an arguable theory that the only decision that could be rendered in the bank's cause of action against Walker and her counterclaim against the bank would be a decision in her favor. The judge in the case against the law firm permitted no discovery against the Defendants and refused to issue an order compelling production of documents by the Defendants. The Defendants moved for summary judgment without an answer to the complaint or amended complaint on September 13, 1991. Subsequent to the Motion for Summary Judgment and while discovery continued in the bank's case against Walker, she discovered that attorney William McDermott, representing the bank on Walker's counterclaim, had obtained a consumer credit report on Walker under false pretenses. Windom was the attor-

ney of record for the bank's claim against Walker. She again amended her claim on November 15, 1991 for violation of 15 U.S.C. 1682q. The Defendants again failed to admit or deny the amended claim and did not request a summary judgment on the new cause of action. Circuit Judge James H. Reid, Jr. issued a summary judgment in behalf of the Defendants on January 2, 1992. There is no record of the Circuit Judge's making a sua sponte motion for summary judgment on the cause of action alleging the obtaining of a consumer credit report under false pretenses. Judge Reid refused to allow any oral arguments or further testimony subsequent to September 25, 1991.

Subsequent to Judge Reid's granting of the summary judgment, Walker learned that the Defendant Stephen R. Windom and other members of his law firm and Judge Reid had been involved in a series of transactions which defrauded Savings & Loan Institutions out of millions of dollars. Walker requested that the judge recuse himself because of the close business relationship maintained with the law firm. She further asked that the summary judgment be vacated and that the cause of action be reconsidered. Judge

Reid refused to recuse himself and Walker requested a Writ of Mandamus from The Supreme Court of Alabama. The Supreme Court of Alabama declined to issue the writ of mandamus. Judge Reid failed to rule on the Motion to Vacate Judgment and it was denied as an act of law after 90 days.

Walker filed notice of appeal to The Supreme Court of Alabama on May 27, 1992. After transmission of the Clerk of the Court's record on appeal, Walker learned that Judge Reid withheld all five depositions submitted to the Court as part of the record on appeal. Walker immediately furnished the Supreme Court with the depositions, but was unable to determine by the Supreme Court's actions whether such depositions were utilized by the Alabama Supreme Court.

The Supreme Court of Alabama affirmed the decision of the lower court on December 11, 1992. Walker filed her Application for Rehearing on December 28, 1992 requesting that the Supreme Court correct numerous errors in its statement of facts and that it reverse its wrongful affirmation. The Supreme Court overruled the Application for Rehearing, issuing no opinion.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the state court of last resort in Alabama has decided federal questions in a way that conflicts not only with its own decisions, but with those of appeals courts and courts of last resort in other states. The Supreme Court of Alabama has sanctioned judicial proceedings by a lower court that were radical departures from the accepted and usual course of judicial proceedings. The guarantees of due process of law, equal protection under the law and the right to a trial by jury have all been denied in this case.

The Petitioner was deprived of due process of law as guaranteed under Amendment XIV of the Constitution of the United States and the Alabama Rules of Civil Procedure 56(c) when The Supreme Court of Alabama upheld the Circuit Judge's granting of summary judgment in favor of the defendants on Petitioner's amended complaint that the defendants in the action had obtained a consumer credit report under false pretenses, a violation of 15 U.S.C. Section 1681q. The judge granted a summary judgment when there

had been no motion filed by either party on that matter and when no sua sponte motion for summary judgment was made known to either party that the judge was considering issuing a summary judgment on that matter.

The Defendants in the matter had issued a Motion to Strike, however the judge did not rule upon this motion, but apparently converted the motion to strike to a motion for summary judgment without notice. The Alabama Supreme Court specifically ruled in Hales v. First Nat'l. Bank of Mobile, 380 So.2d 797, (Ala. 1980) that the district court's conversion of motion to dismiss into motion for summary judgment without giving notice to nonmoving parties prior to entry of summary judgment was prejudicial error. The exact same principle of law applies in this instant case. In Hales the court says, "The concepts of notice, admissibility, and opportunity to be heard are ancient primaries."

In this instant case, the Supreme Court of Alabama has issued a decision which conflicts not only with its own rulings but with rulings issued in other states.

> "Due process of law applies to method of making judicial decision, as well as to protection of procedural and substantive rights." Kramer Trading Corp. of Texas v. Lyons, 740 S.W.2d 522 (Tex.App.-Houston [1st Dist.] 1987)

Since the Circuit Judge did not strike the amended claim, one may only conclude the amended claim was allowed and the granting of summary judgment without a hearing on the matter was a denial of due process of law. Once the amended claims have been allowed, it is improper to grant a summary judgment on the previous claims without consideration of the new cause of action. Perry v. Atkinson, 240 Cal.Rptr. 402; MacDonald v. Vasselin, 373 S.E.2nd 221 (Ga.App. 1988).

> "The right to be heard includes the opportunity to introduce evidence, to cross-examine witnesses, to be heard on questions of law and to have judgment rendered only after trial." Jordan v. Jordan, 653 S.W.2d 356, 368 (Tex.App.-San Antonio 1983)

Walker's constitutional rights have been denied since she was not granted these opportunities.

Alabama Rules of Civil Procedure required that a 10-day notice be given to the parties before the hearing of a motion for summary judgment. The court's ruling is in direct conflict with its previous decisions in Hales v. First Nat'l Bank, 380 So.2d 797 (Ala. 1980) and

Hightower & Co. v. United States Fid. & Guar. Co., 527 So.2d 698 (Ala. 1988).

When Alabama permits a denial of due process of law to Walker and she could have availed herself of due process of law as a resident of Texas or Georgia, she is denied equal protection under the law, a further violation of her constitutional rights.

Clearly the constitutional right of Thelma Walker to due process of law has been denied by the State of Alabama and that summary judgment which denied her due process of law is due to be reversed.

The Supreme Court of Alabama grievously erred when it affirmed the Circuit Court's decision for summary judgment on a claim of malicious prosecution. The Circuit Court illegally invaded the province of the jury thereby denying Walker the right to jury trial and violating Amendment Vli to the U.S. Constitution. Alabama abandoned over 100 years of case law when it decided that malice may not be inferred by a want of probable cause.

> "Malice may be inferred from the want of probable cause for setting the prosecution on foot." McLeod v. McLeod, 75 Ala. 483. "The want of probable cause may have been so apparent or palpable that the mind of the jury would be naturally led by that

> fact alone to conclude that the prosecution must have been malicious; whereas, on the other hand, the circumstances might have been such that though when closely weighed, and legal rules applied, they did not create probable cause, yet were sufficient to induce the mind of the jury to require further proof of malice. It is always a question for the jury whether a want of probable cause alone justifies an inference of malice; at least, if there is any evidence tending to show that there was such cause, or that the prosecutor honestly believed there was." Jordan v. Alabama G.S.R. Co., 81 Ala. 220 (Supreme Court of Alabama, Dec. Term, 1886).

The Alabama Supreme Court has consistently held for over 100 years that the jury may infer malice from the lack of probable cause alone and that it is for the trier of fact to make that inference. Since a jury trial had been demanded, the judge could not be the trier of fact.

Walker gave unrebutted testimony as to the lack of a reasonable investigation by Windom or any attorney prior to the preparation, signing and filing of the suit against Walker by his unlicensed employees. (See Appendix, pages 18-25). Walker's testimony was based on depositions of bank employees and the law firm's employees and those depositions were entered with the court in support of her testimony. In her testimony, Walker specifically detailed what documents were pos-

sessed by the law firm prior to the initiation of the suit and what documents they needed in order to form a reasonable opinion as to the possibility that she might be indebted to the bank. Walker's testimony specifically detailed the facts unknown to the law firm that would of necessity have to be known before forming an opinion as to probable cause and that they did not make any effort to obtain such knowledge through a reasonable investigation of the law and the facts. Walker offered unrebutted proof to the court that the attorney did not personally sign the complaint or alias complaint, a violation of rules of civil procedures, number 11. Alabama rule 11 is very similar in nature and content to Federal rule 11 and in an unpublished opinion in the case of Standard Guaranty Ins. Co. v. Fidelity & Deposit Co. of Maryland, U.S. Eleventh Circuit Court of Appeals, No. 92-2034, DC No. 91-835 CIV-T-17B, the court held that when the counsel of record did not personally sign the pleadings that they were to be treated as if they were unsigned. Walker's investigation and testimony before the court presented 19 other cases in which it was Windom's usual and customary procedure to allow other non-attorney employees of the law firm to sign

his name on complaints and affidavits. The fact that Windom did not personally sign the complaint and alias complaint is evidence from which a jury may make inferences as to whether Windom had read the complaint or had formed any opinion as to whether Walker was indebted to the bank. Walker's testimony and evidence put forth before the court absolutely documented the fact that no reasonable investigation whatsoever had been done. The Alabama Supreme Court's opinion on the case did not reject Walker's claim of malicious prosecution on the basis that the attorney had made a probable cause investigation and decision. Walker's allegation that there had been no investigation by Windom was unrefuted in any manner. Probably the most telling thing here is that Windom never denied that he failed to make an investigation of the law or the facts. The unlicensed person who prepared, signed and filed the complaint admitted she did not read their collection file. This is a textbook example of malicious prosecution in which the attorney made no investigation of the law or facts and does not deny the allegations. For purposes of summary judgment, the court must accept Walker's testimony as true.

Walker's testimony established clearly that there was no probable cause.

The Supreme Court of Kansas' decision in Hunt v. Dresie, 740 P.2d 1046 (Kan. 1987), is in direct conflict with the Supreme Court of Alabama's decision in this instant case. In forming its opinion, the Kansas Supreme Court quotes from other cases,

> "In the absence of probable cause, courts permit but do not direct juries to infer malice." Nelson v. Miller, 227 Kan. at 279. "The plaintiff's attorney in the original action may also be held liable for malicious prosecution." 227 Kan. at 276. This case goes on to state: "It is obvious that the client must rely upon his lawyer to make a reasonable investigation of his case. Likewise the attorney must accept the obligation to conduct a reasonable investigation in an attempt to find what the true facts are before filing a civil action on behalf of his client." 227 Kan. at 284.

When the attorney fails to investigate the law and the facts for the benefit of the client, he violates duties imposed upon him by the rules of the court. When his client suffers damages because the attorney has been negligent in his duties, his client may bring a malpractice suit against him. When his client's prevailing opponent suffers damages because the attorney failed to perform a reasonable investigation and form an opinion as to probable cause, that person may bring suit

against the attorney for malicious prosecution. Failure on the part of the attorney to investigate is negligence as to his client. It is also a reckless disregard for the rights of the client's opponent when, as a result of the attorney's failure to do a reasonable investigation, he brings a suit without probable cause. If the court simply applies the logic of the negligence toward his client to the other side of the question of malicious prosecution, the following quote from Hunt is outstanding.

> "The difficulty herein lies in the fact that the finding of negligence was made in a motion for summary judgment. Had the finding been made following a bench trial, we would be in an entirely different situation on appellate review. Whether or not defendants were negligent in filing the suits depends upon the totality of the circumstances as determined by the trier of facts. Because district judges and appellate court judges are, themselves, attorneys, they naturally have opinions as to whether or not certain conduct constitutes legal malpractice. It is easy to slip into the trap of deciding such questions "as a matter of law." Not having a like expertise in other professions such as medicine or architecture, the issues of professional negligence there are routinely submitted to juries. Nevertheless, claims of legal malpractice, like other forms of malpractice, are normally to be determined by the trier of fact rather than by summary judgment. We conclude that both the district court and the Court of Appeals erred in holding that defendant attorneys were negligent as a matter of law in filing the Note and Bank cases."

Likewise, it is routine in Alabama for over 100 years to submit the question of malice to the jury. The judge

cannot make the inference that there was a lack of malice when there has been a finding that there was no probable cause.

Further cited in Hunt was the case of Haverty v. Haverty, 35 Kan. 438, 444-45 (1886).

> "An attorney not guilty of misconduct or fraud will be protected, when he acts to the best of his skill and knowledge, and of course is not answerable for every error or mistake. He is legally responsible to his client only for the want of ordinary care and ordinary skill; but he must conduct him with honor and integrity."

Windom must answer to Walker for his failure to investigate the law and the facts and for the bringing of a suit against her without probable cause that caused her damages.

Walker claimed that Windom was forbidden to bring a suit against her by 15 U.S.C. Section 1666(a)(3)(B) because she had invoked the protection of this statute when she disputed owing the debt and demanded copies of the charge tickets evidencing the debt. Her dispute of the debt was made on the very first day that she was notified that any charges were due and owing on the account. She disputed the debt both in the telephone conversation with the collector from the bank and in writing on that same date. This

section prevents any attempt to collect the debt until the creditor complies with its obligation to furnish the requested documentation to the customer. By agreement with the bank, Walker's name was to have been removed from the account when it had been paid in full. Evidence of the agreement was before the trial court and accepted by the Supreme Court of Alabama as noted in its statement of facts. Walker did not allege that the law firm was to be held accountable under 15 U.S.C. Section 1666(a)(3)(B), but since the law suit was brought by the attorney's client in violation of that statute, the attorney was guilty of malicious prosecution when he knew or should have known that Walker had a complete and total defense against the action taken by the bank. Walker repeatedly stated throughout the case she was not holding the law firm accountable for damages under that statute, she was holding them responsible for the tort of malicious prosecution. The circuit judge failed to understand that concept, as well as The Supreme Court of Alabama. Walker is deprived of due process when the court made a decision without understanding the facts or the law.

The Supreme Court of Alabama erred in its state-

ment of facts when it said that Walker obtained a final judgment against the bank's claim in July 1991. In fact, Walker only obtained an interlocutory judgment against the bank in July 1991 and did not obtain a final judgment against the bank until the jury rendered its decision on March 20, 1992. The State of Kansas requires that the judgment be final prior to the initiation of a malicious prosecution suit. Hunt v. Dresie, 740 P.2d 1046 (Kan. 1987). For over 100 years Alabama required a final termination of the underlying case as an element of malicious prosecution. If a termination of the underlying case was not final, then the court could not issue a summary judgment with prejudice terminating the right of Walker to bring suit when the cause of action later became ripe for prosecution.

Alabama is shielding Stephen R. Windom from malicious prosecution illegally when it refuses to allow a decision on malice to be made by a jury. It allows the jury to infer malice from the lack of probable cause in actions against non-attorneys. The Walker case originated in Baldwin County, Alabama and she cites another Baldwin County case of malicious prosecution as being similar in circumstances, but not involving mali-

cious prosecution against an attorney to show that she is not being treated equally under the law. This case is Empiregas, Inc. of Elberta v. Feely, 524 So.2d 626 (1988). The attorney for Empiregas brought suit against Feely when he knew that Feely had a complete and total defense to the suit. The defense was the statute of limitations. The questions of probable cause and malice were properly taken before the jury.

There were two compelling reasons why Windom should not have brought suit against Walker. The first was that she was not an obligor to the bank and the second was that Title 15 U.S.C. Section 1666(a)(3)(B) provided a complete and total defense against the suit until the creditor complied with the statute. The creditor failed to comply with the statute before the suit. The statute normally protects parties obligated on a credit card debt, but it has been held that when the creditor creates an account in the name of a party who has no account and reports the delinquent obligation to other parties that for the purposes of law, that party is afforded protection under 15 U.S.C. Section 1666. Saunders v. Ameritrust of Cincinnati, 587 F.Supp. 896 (1984). Walker claimed protection under that statute

and was not subject to suit until the creditor complied with the statute. Windom was not aware of either of the defenses because he had done no investigation.

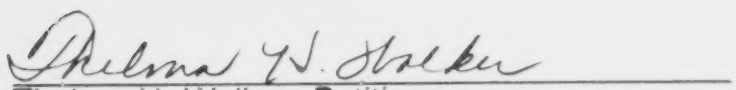
An attorney cannot avoid a suit for malicious prosecution because he willfully remained ignorant of the law and the facts. However, in Walker v. Windom, the Supreme Court of Alabama now holds the position that you cannot infer malice when an attorney willfully remains ignorant of the law and facts through no investigation. This is a discriminatory change in Alabama law that allows unequal treatment under the law. That is not constitutional and the decision must be reversed.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of The Supreme Court of Alabama in this matter.

Dated: May 5, 1993.

Respectfully submitted,



Thelma H. Walker, Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

NO. _____

THELMA H. WALKER

Petitioner,

v.

STEPHEN R. WINDOM
AND THE LAW FIRM DBA
SIROTE & PERMUTT, ET AL.

Respondents.

PROOF OF SERVICE

I, Thelma H. Walker, do swear or declare that on this date, May 5, 1993, pursuant to Supreme Court rules 29.3 and 29.4, I have served the attached PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addresed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Fred K. Granade
Stone, Granade, Crosby & Blackburn, P.C.
P. O. Drawer 1509
Bay Minette, Alabama 36507-1509

Thelma H. Walker

Thelma H. Walker, Affiant

Subscribed and Sworn to Before Me
this 5th day of May, 1993.

Notary Public in and for said
County and State
My commission expires: 8-23-95

92-1773

Supreme Court, U.S.
FILED
MAY 5 - 1993
CLERK OF THE COURT

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THELMA H. WALKER,

Petitioner,

vs.

STEPHEN R. WINDOM
AND THE LAW FIRM DBA
SIROTE & PERMUTT, ET AL,

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI ON DECISION FROM THE SUPREME COURT OF ALABAMA

COUNSEL OF RECORD:

Thelma H. Walker, Pro Se
P. O. Box 689
Fairhope, Alabama 36533-0689
205/928-2655

Respondent's Attorney
Fred K. Granade
Stone, Granade, Crosby & Blackburn, P.C.
34 Pine Street
Bay Minette, Alabama 36507
205/937-2417

TABLE OF CONTENTS

Page

Walker v. Windom, Supreme Court of Alabama, Case Number 1911386, December 11, 1992 1

Walker v. Windom, Supreme Court of Alabama, Case Number 1911386, December 11, 1992, Rehearing Denied 8

Walker v. Windom, Baldwin County Circuit Court, Case Number CV 91-217 Order Granting Summary Judgment. 9

Amendments VII and XIV to the United States Constitution 10

United States Statutes:
15 U.S.C. Section 1681n. 10
15 U.S.C. Section 1681q 10

Alabama Rules of Civil Procedure
Rule 56(c) 11

Affidavit No. 2 in Support of Plaintiff's Response to Defendants' Motion to Dismiss. 12

Testimony of Thelma H. Walker, September 25, 1991. 18

Proof of Service. 26

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1992-93

1911386

Thelma H. Walker

v.

Stephen R. Windom and Sirote & Permutt, P.C.

Appeal from Baldwin Circuit Court

(CV-91-217)

JONES, RETIRED JUSTICE.

The plaintiff appeals from a summary judgment in favor of the defendants in her action alleging malicious prosecution. We affirm.

Thelma Walker and her husband were divorced in 1987. The final judgment of divorce required the ex-husband to pay the outstanding balance owed on a joint credit card account with First Alabama Bank. He paid the balance due and requested that Ms. Walker's named be removed from the account. First Alabama Bank did not comply with this request, and Ms. Walker's name remained on the account; however, replacement cards and billing statements were sent only to the

husband.

Subsequently, the husband accrued another balance on the same credit card account and became delinquent in his repayment of the debt. In April 1990, First Alabama Bank contacted Ms. Walker to request payment, and according to Ms. Walker, she told the First Alabama employee that she was not obligated to repay any amount due on the account because she had not incurred any of the charges due and because she was no longer a party obligated to pay the account. Ms. Walker also claims that, during this conversation, she requested that she be given copies of the "charge slips" upon which the delinquent account balance was based.

First Alabama Bank employed the law firm of Sirote & Permutt to collect the balance on the husband's account. During the summer of 1990, that firm filed separate actions against Ms. Walker and her former husband, both actions seeking payment of the balance on the credit card account. The former husband consented to a judgment against him and arranged to pay the full amount due on the credit card account. Ms. Walker was served with an alias summons and complaint in March 1991, and she answered and counterclaimed

bank, alleging that the bank obtained her credit report under false pretenses. The court entered a judgment in favor of Ms. Walker on July 31, 1991 on the complaint and her counterclaim.

On March 22, 1991, Ms. Walker filed this action against Stephen Windom, the lawyer who had handled the action for the bank, and against the law firm, alleging "fraud, attempted extortion, and malicious harassment." On August 19, 1991, she amended her complaint to state a claim of malicious prosecution. The defendants moved for a summary judgment on September 13, 1991. After numerous pleadings had been filed and three evidentiary hearings had been held, the trial court ordered, on September 25, 1991, that no further pleadings were to be submitted and that no further hearings would be held.

On November 15, 1991, Ms. Walker filed an "amended complaint," seeking to add a claim of "obtaining a consumer credit report under false pretenses." The trial court entered a final summary judgment for the defendants; Ms. Walker's motion to vacate that judgment was denied by operation of law pursuant to Rule 59.1 A.R.Civ.P. This appeal followed.

Maharry v. City of Gadsden, 587 So.2d 966 (Ala. 1991), compels affirmance. Our review convinces us that there was no dispute as to any material fact and that, under the evidence before the trial court, the defendants were entitled to a judgment; thus, their summary judgment is due to be affirmed.

Ms. Walker's theory of the case is two-pronged. She alleges that the individual defendant and the law firm 1) violated various provisions of 15 U.S.C. Section 1601 et seq., the Federal Consumer Credit Protection Act ("the Act"); and 2) engaged in conduct amounting to common law malicious prosecution.

With respect to Ms. Walker's first allegation, we find that, although certain duties owed Ms. Walker under the Act may have been breached, the obligation to perform those duties was not upon these defendants. By statute, it is the creditor (in this case the bank) who must comply with the Act's requirements, not a third party (such as these defendants). See 15 U.S.C. Section 1666; and Reddic v. Gary H. Watts Realty Co., 762 F.2d 1181 (4th Cir. 1985). Therefore, because these defendants are clearly not creditors of Ms. Walker or of her former husband, they can not be held liable for a violation of the

Act.

Whether the evidence presented by Ms. Walker in support of this prong of her argument would be sufficient to hold the bank liable for violations of the Act we need not decide. The bank is not a party to this action. We do find, however, that the evidence is not sufficient to hold these defendants liable for violations of the Act; therefore, the trial court correctly entered the summary judgment with regard to the claim based on the Act.

Turning to the second prong of Ms. Walker's theory, we hold that the defendants' conduct here does not meet the requirements of a malicious prosecution claim; therefore, the trial court correctly entered the summary judgment as to Ms. Walker's malicious prosecution claim. This Court has held:

> "'For the trial court to have erred in granting summary judgment for [the defendant] on the malicious prosecution count, there must have been some direct or circumstantial evidence from which the trier of fact could reasonable infer each of the following elements, which [compose] a cause of action for malicious prosecution: (1) that a judicial proceeding was initiated by [the defendant] against [the plaintiff], (2) that the judicial proceeding was instituted without probable cause, (3) that the [proceeding was] instituted by [the defendant] maliciously, (4) that the judicial proceeding had been terminated in favor of [the plaintiff], and (5) that [the plaintiff] suffered damage as a proximate cause of the judicial proceeding.'"

Skinner v. Etheridge, 564 So.2d 902 (Ala. 1990) (quoting Smith v. Wendy's of the South, Inc., 503 So.2d 843, 844 (Ala. 1987).

We need not discuss here each element of a malicious prosecution cause of action, because no reading of the evidence before the trial court yields any inference to support the element of "malice". We acknowledge that the element of malice in a malicious prosecution claim need not be proved by direct evidence but may inferred from the totality of the evidence presented. National Security Fire & Cas. Co. v. Bowen, 447 So.2d 133 (Ala. 1983). However, the factfinder may not infer the element of malice in considering a malicious prosecution claim where, as here, there is no evidence to support such an inference.

Having reviewed the evidence that was before the trial court; having found no evidence to create a genuine issue of material fact; and having thus concluded that Ms. Walker's claims are not supported by the evidence of record, we affirm the defendants' summary judgment.

This opinion was prepared by retired Justice Richard L. Jones, sitting as a Justice of the Court

pursuant to Section 12-18-10(e), Ala. Code 1975, and his opinion is hereby adopted as that of the Court.

AFFIRMED.

Hornsby, C.J., and Maddox, Almon, Shores, Adams, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
February 5, 1993

1911386

Thelma H. Walker v. Stephen R. Windom and Sirote & Permutt, P.C.
(Baldwin: CV-91-217)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

Hornsby, CJ., Maddox, Almon, Shores, Adams, Houston, Steagall and Ingram, JJ., concur.

IN THE CIRCUIT COURT OF BALDWIN

COUNTY, ALABAMA

THELMA H. WALKER,	*	
Plaintiff,	*	
vs.	*	CASE NO. CV-91-217
STEPHEN R. WINDOM,		
ET AL.,	*	
Defendants.	*	

ORDER GRANTING SUMMARY JUDGMENT

The Court having this day considered the motion for summary judgment filed by the Defendants and all matters filed in support of such motion and in opposition thereto; and the Court having further heard oral argument in relation to said motion is of the opinion that the same is due to be, and hereby is, granted.

It is therefore ORDERED, ADJUDGED and DECREED that summary judgment is entered in favor of the Defendants in this cause dismissing the action with prejudice.

DONE this 2nd day of January, 1992.

James H. Reid

CIRCUIT JUDGE

Amendments VII and XIV to The Constitution of the United States

Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment XIV:

"...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 15 U.S.C., Sections 1681n and 1681q.

Section 1681n:

"Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of-

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court."

Section 1681q:

"Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than

$5,000 or imprisoned not more than one year, or both."

Rule 56(c) - Summary Judgment - 1992 Alabama Rules of Civil Procedure

"(c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidvaits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatores, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

THELMA H. WALKER, *

Plaintiff, *

vs. * CASE NO. CV 91-217

STEPHEN R. WINDOM AND THE LAW FIRM D/B/A SIROTE, *
PERMUTT, ET AL,

Defendants. *

AFFIDAVIT NO. 2 IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

STATE OF ALABAMA

COUNTY OF BALDWIN

BEFORE ME, the undersigned Notary Public personally appeared in and for said State and County, Thelma H. Walker, and after having been duly sworn, did state as follows:

1. My name is Thelma H. Walker. I am in the Plaintiff in the above styled cause.

2. I have examined other public documents filed in the District Court of Baldwin County to determine whether or not the customary and usual style of Stephen R. Windom's and Sirote & Permutt's is that of fraud and

deception or whether in my case it was simply an oversight. Based upon my examination of nineteen (19) other cases, I have determined that fraud and deception upon the Court is regularly and routinely practiced by Stephen R. Windom and the law firm of Sirote & Permutt, P.C. In 100% of the cases examined none of the complaints were signed by the attorney of record or by the Plaintiff. In all of the cases the complaints were defective and failed to state a cause upon which relief can be granted. All of these cases cited the grounds for suit as "contract" or open account" or by "virtue of contract". None of these complaints alleged a breach of contract or contract in default or any other grounds upon which a suit could be brought. All of these complaints were signed by persons other than the attorney of record or the Plaintiff. This is a violation of Rule 11 of The Alabama Rules of Civil Procedure.

3. Rule 11 states, "The signature of an attorney constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay." The parties signing these complaints are not the Plaintiffs,

are not attorneys, are not licensed to practice law, and cannot believe anything for another person. The attorney himself must sign the document because he is the only one that can believe for himself. Permitting other persons to sign these documents and concealing such information from the Courts is fraud.

4. For a willful violation of Rule 11, "an attorney may be subjected to appropriate disciplinary action." Stephen R. Windom's violations are not simple errors by the clerks, but the regular and routine manner in which he operates in the Baldwin County Court Systems. He violated these rules in all of the nineteen (19) cases attached, plus he violated this rule in my case. The magnitude of this fraud cannot be simply ignored.

5. The law firm of Sirote & Permutt, P.C. and its attorney, Stephen R. Windom, have further filed fraudulent affidavits with the District Court of Baldwin County. There are sixteen (16) fraudulent affidavits attached. All but one of the affidavits are signed by means of a rubber stamp. The affidavits were created in mass by a computer system and the documents were simple rubber stamped for the attorney and fraudulently notarized by his employees. In eight of the sixteen attached af-

fidavits, they neglected to change the date from 1990 to 1991 during the first two months of 1991. On the other affidavit that is signed, the signature is a forgery of Stephen R. Windom and has remained concealed until this time. Mr. Windom has not appeared before the notary, has not read the documents but he has approved the fraud upon this Court by his actions. The rubber stamp is no more valid than a typed name of the attorney on an affidavit since it does not signify in any manner that the affiant appeared before the notary. The submission of false affidavits to the Court is a Class C felony and is perjury in the first degree under Alabama Statute 13A-10-101. A copy of this statute is attached. Submission of unsworn falsifications to public authorities is a Class C misdemeanor under Statute 13A-10-109. (Copy attached).

6. Mr. Windom is running nothing more than a collection agency in the District Court of Baldwin County and does not appear to be actively involved in these cases in any manner even though all of the documents purportedly contain his signature. Mr. Windom has perpetrated a massive fraud upon the Court System of Baldwin County and its citizens.

7. Charlene R. Schmidt, Notary Public and employee of Sirote Permutt, P.C., has been most active in the cases examined. She is one of several parties who have created the fraudulent documents for Mr. Windom.

8. Charlene R. Schmidt did not maintain a register of notarized documents as required under Alabama Statute 36-20-7 and, as a matter of fact, she has maintained no type of register. The law firm of Sirote & Permutt, P.C. is a large law firm and holds itself out to the public as being expert in the matters of law, yet it permit its employees to violate Alabama Statutes, commit fraud and the lawyers conceal it.

9. Other lawyers in the law firm, including Steven L. Nicholas, were aware of the fraudulent and illegal acts of Stephen R. Windom, yet they have failed to report these violations to the Alabama State Bar as required under 8.3 of the Alabama Rules of Professional Conduct. This knowledge was not privileged information to these parties and they were required to report it so that disciplinary action could be implemented against Stephen R. Windom. These lawyers who failed to report these fraudulent acts are now guilty themselves.

Dated this 30th day of April, 1991.

Thelma H. Walker, Plaintiff
P.O. Box 689
Fairhope, Alabama 36533-0689

SWORN TO and SUBSCRIBED before me on this the 30th day of April, 1991.

Sue D. Boone
NOTARY PUBLIC
My commission expires: 6-11-91

This instrument was prepared by:

Thelma H. Walker
P.O. Box 689
Fairhope, Alabama 36533-0689
205/928-2655

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 30th day of April 1991 served a copy of the foregoing Affidavit No. 2 in Support of Plaintiff's Response to Defendants' Motion to Dismiss Samuel N. Crosby, attorney for the Defendants, by placing same in the United States mail properly addressed and postage prepaid.

Thelma H. Walker, Plaintiff
P.O. Box 689
Fairhope, Alabama 36533-0689
205/928-2655

THELMA H. WALKER
P. O. Box 689
Fairhope, Alabama 36533-0689
205/928-2655

September 25, 1991

Honorable Judge James H. Reid
Baldwin County Circuit Court
Bay Minette, Alabama 36507

Re: Walker v. Windom
Case Number CV 91-217

Dear Judge Reid:

I am herewith submitting a copy of my statement that I read into the Court record as testimony given in open court and under oath on September 25, 1991.

Sincerely,

Thelma H. Walker

cc: Jackie N. Calhoun
Samuel N. Crosby

My name is Thelma H. Walker. I reside in Fairhope, Alabama.

I was married to Eddie L. Walker from November 20, 1967 to January 15, 1987. Mr. Walker and I separated in October 1986. At the time of our separation, Mr. Walker demanded that I return to him a VISA credit card issued by First Alabama Bank. I complied with Mr. Walker's request.

Mr. Walker assured me that he would have my name removed from this account. I did ask him for the account number a short time later so that I might myself check to see if this had been done. Mr. Walker refused to give me the account number stating that he had taken care of the matter.

I would like to enter into evidence as Plaintiff's Exhibit 1 a copy of the affidavit signed by Eddie L. Walker in which he states that he telephoned First Alabama Bank and asked that my name be removed from the account. His affidavit goes on to say that until the account had a zero balance, First Alabama Bank would not remove my name.

I would like to enter into evidence as Plaintiff's Exhibit 2 this copy of the VISA account statement issued by First Alabama Bank dated January 1989 showing that the account had reached a zero balance.

I enter into evidence as Plaintiff's Exhibit 3 this copy of the computerized collection record of First Alabama Bank which shows the space "other cardholder" to be blank on this account. The only place my name appears is on name line 2, which is apparently an oversight by the bank and is merely a part of the address.

The divorce decree of Eddie L. Walker and Thelma H. Walker was issued by Judge Thomas B. Norton on January 15, 1987. I enter a copy of that divorce decree in evidence as Plaintiff's Exhibit 4. This decree states in item 9, "That Plaintiff (Eddie L Walker) will be solely responsible for the $1,200.00 signature loan to First Alabama Bank and the outstanding VISA bill of $400.00 and shall hold the Defendant harmless from any liability

thereon." This decree is a public document and gives First Alabama Bank constructive notice of the divorce as does this announcement of Divorces published in the WEEKEND EDTION of the ONLOOKER on February 1, 1987 which I now enter as Plaintiff's Exhibit 5.

Having no liability to the bank as an authorized user, and believing that Eddie L. Walker had properly notified the bank, I did not pursue the matter further. I heard nothing regarding this matter from either Mr. Walker or the bank until April 24, 1990 some three and one-half years later.

On that date, Irish O'Reilly telephoned me at my place of employment and insisted that I was obligated to pay for some $2,672.28 in charges which were made to the VISA card account. I informed Mr. O'Reilly that I had made no charges, knew nothing of the charges, was not responsible for any such charges and would not pay those charges. She said I was liable for the debt by virtue of my signature on the original credit application. I demanded copies of the charge tickets at that time to verify who had made the charges, if they were in fact made by an authorized user. It was my understanding that the bank would forward those copies to me.

On that same date, April 24, 1990, I wrote a letter to the bank disputing the charges. I would like to enter a copy of that letter in evidence as Plaintiff's Exhibit 6. For the record, the letter reads: (read letter)

Sherry Spivey, First Alabama Bank's collection department supervisor, responded to my letter by sending a copy of the credit application which I enter into evidence as Plaintiff's Exhibit 7. The application is not marked as a joint account.

I heard nothing further from First Alabama Bank regarding this debt until March 4, 1991 when I was served with a summons, complaint and alias complaint which I enter now as Plaintiff's Exhibit 8.

First Alabama Bank did not send me copies of the charge tickets as requested. Sherry Spivey stated in her deposition of September 17, 1991 that no charge tickets

were ordered by the bank to send to anyone until April 1991. She further stated that she did not know why the copies were not sent in April of 1990 approximately one year earlier. This is a violation of 15 USC, Section 1666.

Because of my Request for production, the bank furnished copies of collection letters that were mailed subsequent to the dispute of the account. These letters were mailed in May and June of 1990 and contain Thelma Walker's name on them. No collection activity of any type is permitted under Title 15 USC, Section 1666 of amounts in dispute until the creditor has complied with the law. This was a flagrant violation of federal law. The deposition of Sherry Spivey on September 17, 1991 verified the bank's continued collection activity after the dispute. I would like to enter as evidence a copy of Title 15 USC, Section 1666 and 1637 along with copies of the collection letters sent by First Alabama Bank as Plaintiff's Exhibits 9, 10 and 11.

Section 1666 in summary says, if the debtor writes a letter disputing the account and if the debtor requests documentation of the charges, the bank must comply with the debtor's request for documentation before they engage in any collection efforts.

First Alabama Bank then solicited the assistance of the collection department of Sirote & Permutt, P.C. for the continuation of their illegal collection activities of the disputed amounts. Sirote & Permutt continued collection activities of the disputed amount without question and filed a malicious suit against me for debts that I did not owe and for which there was no probable cause for suit. The law firm's total lack of any investigation into the facts or the law related to this suit was the principal cause of the malicious prosecution.

After the bank and the law firm learned that there was no legal basis for the suit, both parties continued the malicious prosecution in this matter.

Pursuant to an order of this Court, First Alabama Bank has produced all documents that it possesses related to this account since the date of the application,. August 2, 1985. The bank's collection department supervisor,

Sherry Spivey, stated in her deposition on September 17, 1991:

1. The bank possesses no charge tickets or any other document that indicates Thelma Walker ever used her credit card.

2. The bank possesses no charge tickets or any other documents that show that the credit card issued to Thelma Walker had been used by any person at any time.

3. The credit card holder is not bound by the terms and disclosure agreement until they utilize the credit card.

A total contract with First Alabama Bank that would obligate a party consists of three different and distinct documents. These consist of:

1. A properly completed and signed application

2. A terms and disclosure agreement

3. A signed charge ticket by the holder which completes the contract

It is interesting to note that the only documents sent to Sirote & Permutt prior to their filing the suit were as follows:

1. An application that was not complete and was not marked as a joint application

2. A terms and disclosure agreement dated November 1989 that applied only to new customers of the bank in November 1989 or later

3. A copy of one side of a billing statement printed on blank paper and lacking the disclosures required by federal law

It is further interesting to note what the law firm did not possess and did not request. The following documents are:

1. A copy of any charge ticket evidencing that any party had ever utilized the credit card

2. A copy of the terms and disclosure agreement that was in force at the date the application was made

3. A copy of collection memoranda from First Alabama Bank

4. A copy of the dispute letter received by the bank from Thelma Walker

The law firm of Sirote & Permutt failed to do the following things to establish a probable cause:

1. It inspected no charge tickets and requested no charge tickets.

2. It did not read the terms and disclosure agreement and determine that use of the credit card was a necessary part of a contract.

3. It did not ask the bank if there was a dispute on the account.

4. It did not ask for collection memoranda from the bank.

5. Sirote & Permutt did not write Thelma Walker at her separate address at any time during their collection efforts. Sirote & Permutt's collections department supervisor, Charlene Schmidt, said a letter has to go out to the debtors about the debt and they must give them 30 days to dispute the debt.

6. Sirote & Permutt did not ask the bank if any party to the application had been removed from the account.

7. Sirote & Permutt did not call Thelma Walker at any time prior to filing suit against her.

8. Sirote & Permutt does not ask if there is any reason why a party has not made payment on the

account, even when they do call.

9. Sirote & Permutt failed to carryout their own collection requirements or any reasonable effort to ascertain whether or not Thelma Walker was obligated on this account.

The non-attorney supervisor of Sirote & Permutt's collection department, Charlene R. Schmidt, did not have the following information because she made no inquiries into the facts:

1. She did not know that the parties were divorced.
2. She did not know who made the charges to the account or if any authorized party had made charges to the account because she did not inspect any charge tickets and the law firm did not have copies of the charge tickets.
3. She did not know the account was in dispute.

I was dismayed at finding numerous signatures for Stephen R. Windom in the various files that I inspected that were located in the Baldwin County Courthouse. It appeared to me that persons other than Stephen R. Windom were signing the complaints and affidavits and that affidavits were being stamped with his name on them. I determined at the deposition of Charlene R. Schmidt on July 3, 1991 that Stephen R. Windom was not signing affidavits, did not read them and that she never administered an oath to him. I further learned that after I filed my suit against the law firm and my complaint with the bar that he apparently began signing his complaints and affidavits. I went back to the court files and determined that the change of attitude did not last long.

Ms. Schmidt told me during the deposition that she was filing approximately 350 or more affidavits per month and that she prepared the claims and other documents for submission to the Court and that she was authorized to read and sign them for the attorney. She is not an attorney, does not have any formal legal training and is not even a paralegal. Yet Mr. Windom has authorized her to practice law in his behalf and he is not supervising her. She said that he couldn't read all the complaints

and I agree.

They are running nothing more than a huge lawsuit mill with 12 collectors doing all the legal work. This is a system totally out of control and their abusive and illegal practices must be terminated. Is this any kind of example for one of the largest lawfirms in the state and should they be permitted to engage in these unlawful practices? Should the people of the state be expected to tolerate one of its lawmakers engaging in such unlawful activities? The answers to both these questions is obviously "no". It must be stopped. I've asked for a judgment against this lawfirm in the amount of $1,000,000 and I believe that Alabama statutes will certainly allow it because of the abusive practices in which this lawfirm has engaged. Their actions have been malicious, fraudulent and without any lawful basis.

The law firm possesses no written instructions, questionnaires or any other devices to assist its personnel in determining whether or not a party has a liability to any creditor.

The law firm does not educate its personnel on a regular basis and the deposition of Charlene R. Schmidt on July 3, 1991 states that the only training they receive is when they first go to work for the firm and they are shown how the system operates.

The law firm's procedures are so grossly inadequate it has maliciously prosecuted me. Untrained and unsupervised personnel are practicing law without a license while the attorney of record is off in Montgomery pursuing his political ambitions.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

NO. _____

THELMA H. WALKER

Petitioner,

v.

STEPHEN R. WINDOM
AND THE LAW FIRM DBA
SIROTE & PERMUTT, ET AL.

Respondents.

PROOF OF SERVICE

I, Thelma H. Walker, do swear or declare that on this date, May 5, 1993, pursuant to Supreme Court rules 29.3 and 29.4, I have served the attached APPENDIX TO PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addresed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Fred K. Granade
Stone, Granade, Crosby & Blackburn, P.C.
P. O. Drawer 1509
Bay Minette, Alabama 36507-1509

Thelma H. Walker

Thelma H. Walker, Affiant

Subscribed and Sworn to Before Me
this 5th day of May, 1993.

Notary Public in and for said
County and State
My commission expires: 8-23-95

(3)

Supreme Court, U.S.
FILED
JUN 02 1993
OFFICE OF THE CLERK

No. 92-1773

In The

Supreme Court of the United States

October Term, 1992

THELMA H. WALKER,

Petitioner,

vs.

STEPHEN R. WINDOM AND THE LAW FIRM DBA SIROTE & PERMUTT, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

FRED K. GRANADE
(Counsel of Record)
STONE, GRANADE, CROSBY & BLACKBURN, P.C.
34 Pine Street
Bay Minette, Alabama 36507
205/937-2417

Counsel for Respondents, Stephen R. Windom, and Sirote & Permutt, P.C.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

PARTIES TO THE PROCEEDINGS

The Petitioner in this Court is Thelma H. Walker.

Respondents in this Court are Stephen R. Windom and Sirote & Permutt, P.C.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDINGS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Preservation of Constitutional Challenges 1

B. Statement of the Facts 2

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE PETITION 4

I. QUESTION ONE – Due Process Argument 4

A. Petitioner Failed to Preserve Her Due Process Argument 4

B. Petitioner Has Not Been Denied Due Process 7

II. QUESTIONS TWO AND THREE – Equal Protection and Seventh Amendment Arguments 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Bankers Life and Casualty v. Crenshaw, 486 U.S. 71 (1988) 5

Hales v. First National Bank of Mobile, 380 So. 2d 797 (Ala. 1980) 8, 9

Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151 (1931) 10

Kentucky v. Stincer, 482 U.S. 730 (1987) 5

Patrick v. Burget, 486 U.S. 94 (1988) 5

Pernell v. Southall Realty, 416 U.S. 363 (1974) 10

Ex Parte Peterson, 253 U.S. 300 (1920) 11

Port of Palm Beach District v. Goethals, 104 F.2d 706 (5th Cir. 1939) 11

MISCELLANEOUS

Ala. R. Civ. P. 12(c) 8

Ala. R. Civ. P. 12(f) 8

Ala. R. Civ. P. 56 ..... 8, 10

Sup. Ct. R. 10 4

No. 92-1773

In The

Supreme Court of the United States

October Term, 1992

THELMA H. WALKER,

Petitioner,

vs.

STEPHEN R. WINDOM AND THE LAW FIRM DBA SIROTE & PERMUTT, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Preservation of Constitutional Challenges

In the petition for writ of certiorari, Petitioner asserts a due process challenge, an equal protection challenge, and a Seventh Amendment challenge concerning the right to a jury trial. However, the record shows that Petitioner failed to raise in the courts below the due process issue asserted in her petition, and that issue was not passed upon by the courts below. Additionally, Petitioner's equal protection and Seventh Amendment challenges are not federal constitutional questions at all, and likewise those issues were not passed upon by the courts

below. Consequently, Petitioner's constitutional challenges are not properly before the Court.

B. Statement of Facts

Petitioner incorrectly states several facts in her petition, all of which are totally irrelevant to the issues asserted in her petition.

Specifically, the trial court did not refuse all discovery in the action below, indeed the court explained to Petitioner methods of discovery to enable her to obtain necessary documents.

All of Petitioner's allegations relating to the trial judge and any alleged bias are based on her own unsworn allegations, none of which she has personal knowledge of, and were never properly before the court.

SUMMARY OF ARGUMENT

In the petition for writ of certiorari, Petitioner proposes to raise three separate constitutional challenges to the Alabama Supreme Court's affirmance of the trial court's summary judgment against Petitioner. However, none of Petitioner's supposed constitutional claims merit review by this Court.

Petitioner's first challenge, a due process challenge, was neither pressed nor passed upon in the courts below. Consequently, there is nothing for this Court to review

with respect to Petitioner's due process argument. Furthermore, even if Petitioner had preserved her due process argument, it is without merit. Petitioner argues that the trial court denied Petitioner's due process by granting summary judgment on Petitioner's second amended complaint without giving Petitioner notice that the second amended complaint was being considered for summary judgment. Petitioner alternatively claims that she was denied due process when the trial court allegedly granted summary judgment without considering Petitioner's second amended complaint. Petitioner's due process arguments are premised on the assumption that the trial court allowed Petitioner's second amended complaint. The record in this case is not clear whether that assumption is correct. Furthermore, the authorities cited and relied upon by Petitioner in support of her alternative due process arguments are factually and legally distinguishable and do not support Petitioner's due process arguments. Finally, even if the Petitioner was correct that the trial court procedurally erred in granting summary judgment, the error would have been harmless since the Alabama Supreme Court specifically determined that summary judgment was properly granted as to Petitioner's second amended claim. Consequently, Petitioner's due process claim fails in all respects.

Petitioner's equal protection and Seventh Amendment arguments are equally without merit. As with Petitioner's due process arguments, neither of the lower courts passed upon Petitioner's equal protection and Seventh Amendment arguments. The reason is simple. Petitioner only made oblique references concerning the

alleged violation of her constitutional rights while rearguing the facts to the courts below. Petitioner again wishes to reargue her case to this Court.

This Court's rules provide that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. The instant petition fails to meet the criteria enumerated in Rule 10. The Alabama Supreme Court's decision does not conflict with any decision of a federal court of appeals or any decision of this Court. There are no federal constitutional questions contained in the petition for certiorari warranting review by this Court.

REASONS FOR DENYING THE PETITION

I. QUESTION ONE – Due Process Argument

A. Petitioner Failed to Preserve Her Due Process Argument

Petitioner asserts that she raised "[the] issue of due process" on several occasions in the trial court and in the Alabama Supreme Court. However, the record clearly shows that Petitioner has not timely pressed the particular due process issue asserted in her petition to either the trial court or the Alabama Supreme Court. Consequently, the trial court had no opportunity to consider or rule on this issue, and the Alabama Supreme Court was under no obligation to consider this issue and, from aught that appears from the supreme court's opinion, the supreme court did not consider it. For this reason alone, the Court need not consider Petitioner's due process argument.

Kentucky v. Stincer, 482 U.S. 730, 747 n. 22 (1987); *see also Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988) ("This Court usually will decline to consider questions presented in a petition for writ of certiorari that have not been considered by the lower court."); *Bankers Life and Casualty v. Crenshaw*, 486 U.S. 71, 79 (1988) ("[T]he policies that animate the 'not pressed or passed upon below' rule . . . [include] a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal.").

The only issues of "due process" asserted by the Petitioner in the trial court were oblique references to Petitioner's constitutional rights contained in her motion to recuse and related filings. However, Petitioner has never asserted the failure of the trial judge to recuse himself as grounds for reversal, and consequently those allegations did not press the due process issue contained in the petition.

Petitioner also failed to properly raise the stated due process issue before the Alabama Supreme Court, as evidenced by the following excerpt of Petitioner's briefs to the Alabama Supreme Court:

Brief to Alabama Supreme Court

> Did the trial court deprive Thelma H. Walker due process of law as guaranteed under the 14th amendment of the U.S. Constitution when it failed to allow a jury to evaluate the evidence of malicious prosecution and the obtaining of a consumer credit report under false pretenses?
>
> When Judge Reid issued a summary judgment in favor of the defendants, he deprived Thelma Walker of a trial by jury and violated Thelma

> Walker's right to pursue her cause of action under due process of law. Judge Reid prevented Thelma Walker from engaging in discovery under rule 34 and failed to enforce the rules of civil procedure related to discovery. He further failed to record documents provided to him under rule 5(e) of the Alabama Rules of Civil Procedure. Thelma Walker did not receive equal treatment under the law.

Application for Rehearing to Alabama Supreme Court

3. Violation of Walker's constitutional rights

* * *

> The Circuit Court of Baldwin County has illegally denied Thelma Walker equal protection under the laws. Judge James H. Reid, Jr. failed to uphold the state's standards in issuing summary judgment in behalf of the defendants against Thelma Walker. Walker was not treated equally under the law or in accordance with the rules of the court. Walker was deprived of a hearing on her complaint and denied due process of law. The Supreme Court has illegally affirmed the Circuit Court's actions.

Regardless of how Petitioner would now like to characterize the "due process" issues quoted above, Petitioner in no way alerted either the trial court or the Alabama Supreme Court of the due process issue she now raises in her petition of certiorari. Petitioner has long since waived the due process argument she raises in her petition. Accordingly, certiorari is due to be denied on that issue.

B. Petitioner Has Not Been Denied Due Process

Even if Petitioner had preserved her due process argument, there is no basis in fact or law to support Petitioner's argument. Petitioner's due process argument is based on the following sequence of events. Petitioner filed her original complaint on March 22, 1991, and amended it on August 19, 1991. On September 13, 1991, Respondents filed a motion for summary judgment as to all of Petitioner's claims. On September 25, 1991 the trial court heard oral argument on Respondents' motion for summary judgment and asked for specific briefs and directed no further argument would be allowed. On November 15, 1991, Petitioner filed a second amended complaint, asserting a new claim against the Respondents based on allegedly improperly obtaining a credit report. On November 18, 1991, Respondents filed a motion to strike Petitioner's amended complaint, and on January 2, 1992 the trial court granted Respondents' motion for summary judgment as to all of Petitioner's claims.

Petitioner's due process argument is first premised on the *assumptions* that the trial court first allowed her second amended complaint and then converted Respondents' motion to strike into a motion for summary judgment. Neither of these assumptions are necessarily true. The trial court failed to specifically rule on Respondents' motion to strike, and the trial court's order granting summary judgment does not delineate whether the second amended claim was even considered by the court. It is an equally plausible assumption that the trial court simply refused to allow Petitioner's second amended claim or implicitly granted Respondents' motion to

strike.[1] Moreover, even if the trial court intended to grant summary judgment as to Petitioner's second amended claim, and procedurally erred in doing so, the error would be harmless. Petitioner appealed all of her claims, including her second amended claim to the Alabama Supreme Court. The Alabama Supreme Court in its opinion determined that summary judgment was appropriate as to that claim. Consequently, if the trial court erred by including Petitioner's second amended claim in his summary judgment order, it was harmless error and did not violate Petitioner's due process rights.

Petitioner contends that the Alabama Supreme Court's decision in her case conflicts with its previous decision in *Hales v. First National Bank of Mobile*, 380 So.2d 797 (Ala. 1980). However, the *Hales* decision involved the conversion of motion to dismiss to a motion for summary judgment. Alabama's Rules of Civil Procedure provide for such a conversion, and the Rule specifically provides that "all parties shall be given reasonable opportunity to present all material" as per Rule 56 (governing summary judgment motions). Ala. R. Civ. P. 12(c). On the other hand, Alabama's Rules of Civil Procedure concerning a motion to strike provide that the court may on its own initiative at any time strike a pleading, and the Rules do not provide for any notice to the parties. Ala. R. Civ. P. 12(f). Furthermore, unlike in *Hales*, in the case at hand a summary judgment motion was already pending as to all

---

[1] The fact that assumptions must be made concerning the trial court's intentions underscores Petitioner's failure to raise this issue below so that the record could be properly developed for review by this Court.

of Petitioner's claims at the time Petitioner filed her second amended claim, and there was no need for the trial court to convert Respondents' responsive pleading into a motion for summary judgment. Thus, even if Petitioner had pressed her due process claim in the trial court and the trial court had passed upon Petitioner's due process issue, there was ample basis for the Alabama Supreme Court to distinguish Petitioner's situation from the *Hales* decision.[2]

II. QUESTIONS TWO AND THREE – Equal Protection and Seventh Amendment Arguments

A mere review of questions two and three which Petitioner poses as equal protection and Seventh Amendment issues reveals the true nature of Petitioner's arguments. Petitioner simply is unhappy with the decisions rendered by the trial court and the Alabama Supreme Court concerning her malicious prosecution claim, and

---

[2] Petitioner appears to alternatively argue that the trial court did not convert Respondents' motion to strike into a motion for summary judgment, but instead granted summary judgment as to Petitioner's first amended complaint without considering the allegations contained in Petitioner's second amended complaint. However, this again assumes that the trial court allowed Petitioner's second amended complaint. Moreover, as noted earlier, the Alabama Supreme Court *did* consider the allegations in Petitioner's second amended complaint and the supreme court specifically determined that those allegations could not support a cause of action against the Respondents. [Pet. for Cert. App. at 4-5.] Therefore, any error by the trial court in failing to consider the allegations of Petitioner's second amended complaint was harmless and could not constitute a violation of Petitioner's due process rights.

Petitioner wishes to reargue that claim to this Court. Question two ostensibly raises an equal protection question that is actually illusory. Petitioner incorrectly states the Alabama Supreme Court's holding in an attempt to create some type of conflict with a decision of the Supreme Court of Kansas.[3] However, even if the law in Alabama differed from the law in Kansas concerning the elements of a malicious prosecution claim, that difference cannot create a federal question for this Court to review.

Likewise, the supposed constitutional challenge posed in Petitioner's question three is wholly without merit. In the first place, the Seventh Amendment has no applicability to this case since it was not incorporated into the Fourteenth Amendment and applied to state procedures. *Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931). Furthermore, the grant of a summary judgment under Alabama procedure does not deny any jury trial rights. Alabama has adopted the equivalent of Federal Rule 56 governing summary judgment procedure. *See* Ala. R. Civ. P. 56. The constitutionality of the Federal Rules of Civil Procedure governing summary judgment is not in question. *Cf. Pernell v. Southall Realty*, 416 U.S. 363, 384 (1974); *see also Ex*

---

[3] Petitioner concludes that "Alabama abandoned over 100 years of case law when it decided that malice may not be inferred by a want of probable cause." [Pet. at 17.] However, the Alabama Supreme Court made no such determination in its opinion. The supreme court simply determined there to be no evidence of malice in this case. [Pet. for Cert. App. at 5-6.] Petitioner's conclusion is apparently based on her unilateral and unwarranted view that there was "unrefuted" evidence of want probable cause.

Parte Peterson, 253 U.S. 300, 309-10 (1920); *Port of Palm Beach District v. Goethals*, 104 F.2d 706, 709 (5th Cir. 1939). Consequently, Petitioner fails to raise a federal question under question three.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

FRED K. GRANADE
(Counsel of Record)
STONE, GRANADE, CROSBY &
BLACKBURN, P.C.
34 Pine Street
Bay Minette, Alabama 36507
205/937-2417

Counsel for Respondents, Stephen R. Windom, and Sirote & Permutt, P.C.